United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original with affidavit of Marlborough

74-2425

To be argued by
DOUGLAS J. KRAMER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2425

SALVATORE A. GALIMI,

Plaintiff,

—*against*—

JETCO, INC.,

Defendant-Appellant,

—*and*—

RICHARD MOORE,

Defendant,

—*and*—

JETCO, INC.,

Third-Party Plaintiff-Appellant,

—*against*—

JAMES HODGES,

Third-Party Defendant,

—*and*—

UNITED STATES OF AMERICA,

Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THIRD-PARTY DEFENDANT-APPELLEE, UNITED STATES OF AMERICA

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Of Counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

PAGE

PAGE

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BRIEF FOR THIRD-PARTY DEFENDANT-APPELLEE, UNITED STATES OF AMERICA

Preliminary Statement

Jetco, Inc., appeals from an order of the United States District Court for the Eastern District of New York (Judd, *J.*), entered October 15, 1974, dismissing appellant's

third-party complaint for contribution or indemnity against the United States of America. Appellant's third-party complaint was filed in connection with a tort action by Salvatore A. Galimi against appellant and another defendant, Richard Moore.

The sole issue on this appeal is whether or not the District Court erred in dismissing appellant's action for contribution from the United States of America. Specifically, the issue is whether or not the District Court correctly held that the Federal Employees' Compensation Act, Title 5 U.S.C. § 8116(c), precludes third-party suits against the United States for contribution arising out of claims made by government employees.

Statement of Facts

[The Memorandum and Order of the District Court (App. 39a) sufficiently sets forth the facts in this case].

ARGUMENT

POINT I

The District Court properly barred appellant's third-party complaint and correctly applied the controlling provisions in the Federal Employees' Compensation Act.

Appellant, Jetco, Inc., was sued by Galimi, a government employee, for injuries resulting from an accident that occurred while Galimi was engaged in government employment. Jetco, Inc. subsequently commenced a third-party action against the United States of America for contribution or indemnity under the principle of apportionment announced in *Dole* v. *Dow Chemical Co.*, 30 N.Y. 2d 143 (1972). In the district court, the United States successfully argued that Section 16(c) of the Federal Employees'

Compensation Act (FECA), Title 5 U.S.C. § 8116(c), barred such an action against the United States and had the third-party complaint dismissed.

Title 5 U.S.C. § 8116(c) creates a limitation on the liability of the United States in cases involving injury or death to government employees. Statutory compensation, not based on fault, is imposed on the United States in its role as employer and the employee has no action against the United States under the Federal Tort Claims Act, Title 28 U.S.C. §§ 1346(b), 2674. *Granade* v. *United States*, 356 F.2d 837 (2d Cir.), *cert. denied*, 385 U.S. 1012 (1967).

Because the exclusive liability provision of Title 5 U.S.C. § 8116(c) limits the liability of the United States to statutory compensation, no action for contributions or tort indemnity can be brought by a tortfeasor sued by a government employee.[1]

(1)

The exclusive liability provisions of the Longshoremen's and Harbor Workers' Compensation Act, Title 33 U.S.C. § 905, have been referred to as nearly identical to the exclusive liability provision in the FECA, *Weyerhaeuser Steamship Co.* v. *United States*, 372 U.S. 597, 602 (1963).

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[1] Although appellant's third-party complaint demanded recovery on the separate theories of contribution or indemnification (9a), it has expressly abandoned on this appeal its contention that it can properly seek indemnification from the United States. Thus, at page four of its brief, appellant notes, ". . . we are dealing only with the contribution problem in this case . . .", and the relief requested in appellant's brief (see Conclusion, at p. 16) is simply addressed ". . . to the claim for contribution . . .". Appellant's argument in the District Court that it was entitled to seek indemnification under a contractual theory was expressly rejected by Judge Judd (App. 45a-46a). We assume, however, that appellant has not intended to abandon its argument that it is entitled to seek indemnification under notions of tort liability.

In *American Mutual Liability Insurance Co.* v. *Matthews*, 182 F.2d 322, 323 (2d Cir. 1950), a decision construing those provisions, this Court stated:

> "[f]or a right of contribution to exist between tort-feasors, they must be joint wrongdoers in the sense that their tort or torts have imposed a common liability upon them to the party injured."

Using this reasoning, the courts have consistently held, under the analogous Longshoremen's and Harbor Workers' Compensation Act, that any liability of an employer to a third person in a third-party action could only be based on a breach of an independent duty to the third person.[2]

Construing the similar language in the FECA, the Courts of Appeals, including the Second Circuit, that have considered the issue have uniformly held that the exclusive liability provision in the FECA, Title 5 U.S.C. § 8116(c), precludes a third-party action against the United States for contribution.[3] *Sheridan* v. *Di Giorgio*, 372 F. Supp.

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[2] *Ryan Stevedoring Co.* v. *Pan Atlantic Steamship Corp.*, 350 U.S. 124 (1956); *Halycon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952); *LoBue* v. *United States, et al.*, 188 F.2d 800 (2d Cir. 1951); *Slattery* v. *Marra Bros.*, 186 F.2d 134 (2d Cir.), *cert. denied*, 341 U.S. 915 (1951); *American Mutual Liability Insurance Co.* v. *Matthews, et al., supra; Rich* v. *United States*, 177 F.2d 688 (2d Cir. 1949).

[3] In its brief before this Court, Jetco, Inc. refers to the *Erie* doctrine as controlling the interpretation of FECA. *Erie*, of course, has no bearing where jurisdiction is based on the Federal Tort Claims Act. Furthermore, Federal law is controlling in determining the scope of the immunity retained by the exclusive liability provision in FECA. *Travelers Insurance Co.* v. *United States*, 493 F.2d 881, 883 (3d Cir. 1974), *Newport Air Park, Inc.* v. *United States*, 419 F.2d 342, 346-347 (1st Cir. 1969). *Accord, Desousa* v. *Panama Canal Co.*, 202 F. Supp. 22 (S.D.N.Y. 1962). In any event, it should be noted that New York law requires joint liability before contribution may be awarded. See Section 1401 of the New York C.P.L.R.

1373 (E.D.N.Y.), *aff'd without opinion,* — F.2d — (Docket No. 74-1728, 2d Cir., October 9, 1974), *Travelers Insurance Co.* v. *United States,* 493 F.2d 881 (3rd Cir. 1974), *Newport Air Park, Inc.* v. *Wiener,* 419 F.2d 342 (1st Cir.), *Murray* v. *United States,* 405 F.2d 1361 (D.C. Cir. 1968), *United Airlines, Inc.* v. *Wiener,* 335 F.2d 379 (9th Cir.), *cert. dismissed sub. nom. United Air Lines, Inc.* v. *United States,* 379 U.S. 951 (1964). Cf. *Maddox* v. *Cox,* 382 F.2d 119, 124 (8th Cir. 1967). Indeed, in the one decision relied upon by the appellant, *Wallenius Bremen G.m.b.H.* v. *United States,* 409 F.2d 994 (4th Cir.), *cert. denied,* 398 U.S. 958 (1970), the court ruled on the issue of indemnity, expressly distinguishing that theory of liability from contribution, the theory relied upon by the appellant in this appeal. *Wallenius Bremen G.m.b.H.* v. *United States, supra,* 409 F.2d at 998.

(2)

Jetco's alternate theory of pleading for relief against the United States was based on indemnity. Because Title 5 U.S.C. § 8116(c) eliminates the underlying tort liability of the United States, the basis for any non-contractual indemnity[4] against the United States on account of an injury to its employee is also eliminated.

In *United Air Lines, Inc.* v. *Wiener, supra,* a number of non-military government employees were killed in a mid-air collision involving a commercial jet and an Air Force trainer. The airline's claim for indemnity against the United States was rejected by the Court (335 F.2d at 403):

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[4] "Indemnity, apart from express contract, can either be implied in law or implied in fact. If it is implied in fact it is said to be derived from the nature of the relationship of the parties. On the other hand, if the right is to be implied in law, it must be based on a 'great difference' in the gravity of the fault of . . . two tortfeasors; or . . . upon a disproportion or difference in [the] character of the duties owed by the two to the injured plaintiff. W. Prosser, Law of Torts 313 (4th ed. 1971)." *Nye* v. *A/SD/S Svendborg,* 501 F.2d 376, 380 (2d Cir. 1974).

> "[I]n the absence of an express or implied contract of indemnity, or in the absence of the indemnitor's liability to the injured party, there can be no recovery for indemnity."

See also *Wien Alaska Airlines, Inc.* v. *United States*, 375 F.2d 736 (9th Cir.), *cert. denied*, 389 U.S. 940 (1967). Similarly, in the leading case of *Slattery* v. *Marra Brothers*, 186 F.2d 134 (2d Cir. 1950), Chief Judge Learned Hand affirmed the dismissal of a third-party complaint which sought indemnity from the plaintiff's employer on a theory of primary versus secondary negligence, stating (186 F.2d at 139):

> "So far as we can see therefore there is nobody [sic] of sure authority for saying that differences in the degrees of fault between two tortfeasors will without more strip one of them, if he is an employer, of the protection of a compensation act; and we are at a loss to see any tenable principle which can support such a result." [5]

The only contrary court of appeals decision allowing an action for non-contractual indemnity against the United States arising out of an injury to a federal employee is *Wallenius Bremen G.m.b.h.* v. *United States*, 409 F.2d 994 (4th Cir.), *cert. denied*, 398 U.S. 958 (1970) Wallenius involved an action by a ship owner for indemnity against the United States arising out of an injury suffered by an inspector of the Department of Agriculture when he fell off an accommodation ladder between the Bremen's ship and the dock. After settling the suit by the inspector, Wallenius the United States under the Federal Tort Claims Act and the Suits In Admiralty Act, Title 46 U.S.C. §§ 741, 742 et seq. The Fourth Circuit reversed a summary judgment for the United States that had been based solely on the exclusive liability provision of the FECA.

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[5] In *Slattery, supra*, the court was bound by New Jersey law.

The Court of Appeals in *Wallenius* relied on three Supreme Court decisions: *Weyerhaeuser Steamship Co.* v. *United States*, 372 U.S. 597 (1963), *Treadwell Construction Co.* v. *United States*, 372 U.S. 772 (1963) and *Ryan Stevedoring Co. Inc.* v. *Pan-Atlantic Steamship, supra.* It is the government's position that the Court of Appeals misread those decisions and applied them overbroadly to vitiate Title 5 U.S.C. § 8116(c).

Weyerhaeuser dealt with a collision between two ships, one of them a United States Army dredge. A federal employee upon the dredge was injured and received compensation from the United States pursuant to the FECA. Thereafter the injured employee sued the owner of the other, non-government, ship and recovered. Subsequently cross libels were filed by the United States and Weyerhaeuser. Included in the damages sought by Weyerhaeuser was the amount paid to the federal employee. At issue before the Supreme Court was the question whether the exclusive liability provision of the FECA barred recovery from the United States of these particular damages. The Supreme Court noted the absence of any contractual relationship between the parties (*Id.* at 603), and held that:

> "the scope of the divided damages rule in mutual fault collisions is unaffected by a statute enacted to limit the liability of one of the shipowners to unrelated third parties" (Id. at 604).[6]

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[6] The holding is apparently in conflict with some other language of the court in the decision discussing the legislative history of the FECA. At page 601, in the text accompanying footnote 5, the court stated:

> "[t]here is no evidence whatever that Congress was concerned with the rights of unrelated third parties. . . ."

In fact, the legislative history supports the court's actual holding that the FECA did deal with liability to unrelated third parties. The bill offered in 1949 to amend the FECA by adding the exclusive liability provision (H.R. 3191) originally referred to

[Footnote continued on following page]

In *Treadwell* the Supreme Court merely remanded, for reconsideration in the light of *Weyerhaeuser*, a Third Circuit decision that had barred indemnity. The decision in the Third Circuit, *sub nom. Drake* v. *Treadwell Construction Co.*, 299 F.2d 789 (3d Cir. 1962), had relied on a broad reading of the exclusive liability provision of the FECA, that had been disapproved, by analogy, in *Weyerhaeuser* where the Supreme Court indicated that the bar of the exclusive liability provision might be avoided by the existence of an historic admiralty rule, or, as in the case of *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, *supra*, by an implied contract to indemnify, *Weyerhaeuser*, *supra*, 372 U.S. at 602-603.[7]

In *United Airlines, Inc.* v. *Wiener*, *supra*, 335 F.2d at 403 the Ninth Circuit distinguished *Weyerhaeuser* by pointing out:

> "The divided damage rule [in *Weyerhaeuser*] is based upon the duty which each shipowner owes the other to navigate safely irrespective of any duty to the person injured. On the other hand neither contribution nor indemnity may be awarded without the support of liability on the part of the indemnitor to the person injured."

In *United Airlines* the court did not rely on the language in Title 5 U.S.C. § 8116(c) relied upon by the Third Circuit in *Drake* and which probably was the reason for the

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"the remedy afforded to any person," thus evidencing a concern only with the rights of the federal employee. But, as enacted, Section 201 of the FECA amendment of 1949, 63 Stat. 854, at 861 dealt with "the liability of the United States," thus evidencing no such limitation. See 95 Cong. Rec. 13606 (September 30, 1949).

[7] Subsequently, the Third Circuit concurred with the majority rule that FECA bars third-party tort actions. *Travelers Ins. Co.* v. *United States*, *supra*.

Supreme Court remand in *Treadwell*. The Ninth Circuit instead relied on the effect of the exclusive liability provision limiting government liability to the injured party and thereby removing the basis for indemnity.

In *Wallenius* the Fourth Circuit ignored the distinction recognized in *United Airlines*, and therein erred. The court allowed indemnity because it felt that a duty to the injured party, rather than tort liability, was sufficient to avoid the bar of Title 5 U.S.C. § 8116(c). The court acknowledged that mutual tort liability is impossible if the government is protected from such liability by statute when it attempted to alter the basic premises upon which so-called tortious indemnity has been founded by substituting "duty" for "liability." A possible source of this confusion might be found in the definition of tortious indemnity or indemnity in law, set forth in footnote 4, *infra* and adopted by this court in *Nye* v. *A/SD/S Svendborg, supra,* 501 F.2d at 380 (2d Cir. 1974). Third party indemnity cannot exist without an underlying liability on the part of the alleged indemnitor. See *Slattery* v. *Marra Brothers, supra,* 186 F.2d at 139. Even if there is such an underlying liability, there must also be "a disproportion or difference in [the] character of the duties owed. . . ." *Nye* v. *A/SD/S Svendborg, supra,* 501 F.2d at 380 (2d Cir. 1974).

The reasoning of the court in *Wallenius* would not only go against the weight of authority in compensation cases, see *Slattery* v. *Marra Brothers, supra,* but would also eviscerate the exclusive liability provision of the FECA.[8] If the rationale of *Wallenius* were accepted then a federal

[8] The unwillingness of federal courts to proceed upon such a premise may be inferred from the length to which they have gone to find an implied contract between the third parties rather than base their decisions on the implication of an independent non-contractual duty owed to the injured party. See cases cited in *Weyerhaeuser Steamship Co.* v. *United States, supra,* 372 U.S. at 602-603.

employee would almost always be able to indirectly sue the federal government. This is so because an injury to a federal employee would rarely occur without the involvement of some non-government instrumentality, such as a car or machine. The owner or manufacturer of this instrumentality would be subject to suit and, if third-party actions were allowed, the government would be required to litigate each one of these actions. It was to avoid this that the exclusive liability provision of the FECA was enacted.

If any duty was owed appellant by the United States it must necessarily arise out of their contractual relationship. If this third-party action were allowed to continue in the district court on a theory of an independent non-contractual duty not only would the exclusive liability provision of the FECA be abrogated, but also the purpose of the Tucker Act's jurisdictional limits would be defeated. The underlying tort action here grew out of a business relationship that involved far more than $10,000. A decision allowing indemnity could have a profound effect on the business dealings of the government throughout the country. The Court of Claims is the appropriate forum for the litigation of such a claim, involving as it would the interpretation of a lengthy tariff of over 200 pages and the duties and liabilities that arise from the business relationship of the parties. It would therefore be appropriate that the Court of Claims, and not the district court, hear and decide the issue of governmental liability.

POINT II

The Federal Employees' Compensation Act does not deny equal protection of the law to appellant.

Appellant complains that it was denied the equal protection of the law by the exclusivity provision in the FECA because it denies it redress against the government.[9] A closer reading of appellant's agreement reveals that it does not so much complain about the sovereign immunity retained by the government under Title 5 U.S.C. § 8116(c) as it does the manner of its retention (Appellant's Brief pp. 10-12).

Appellant apparently argues that, insofar as Title 5 U.S.C. § 8116(c) amends the general waiver of sovereign immunity in the Federal Tort Claims Act, Title 28 U.S.C. § 2674, it is unconstitutional because Congress should have done so by direct amendment (Appellant's Brief, p. 11). There is no authority to support such a limitation on Congress' power to legislate.

The simple answer to appellant's constitutional argument was set forth in the decision of Judge Judd. "The difference between the liability of a private person and the liability of government is fundamental and long established" (44a). Congress may clearly impose such conditions and restrictions on the right to sue the United States as it deems proper. *Broadway Open Air Theater* v. *United States,* 208 F.2d 257, 259 (4th Cir. 1953), *cf. Henninger* v. *United States,* 473 F.2d 814 (9th Cir. 1973).

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[9] Appellant probably intends to claim that he is denied due process, the Fourteenth Amendment not being applicable to the Federal government.

CONCLUSION

The order of the District Court should be affirmed.

January 10, 1975

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 10th day of January, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THIRD-PARTY DEFENDANT-APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Sergi & Fetell, Esqs.
44 Court Street
Brooklyn, N. Y. 11201

Evelyn Cohen

Sworn to before me this
10th day of January, 1975

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1976

_____ Action No._____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____
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Dated: _____, 19____

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Attorney for _____

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States Attorney,
for _____

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